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No. 84-769

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

ALBERT JOHN FERN, JR. and
ROBERT LEWIS STIRM, PETITIONERS,

vs.

JOAN TURMAN, JOHN O. MARSH,
SECRETARY OF THE ARMY, LORETTA F. ADAMS
AND VERNE ORR, SECRETARY OF THE AIR FORCE,
RESPONDENTS.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the federal district courts in the cases below properly decline to exercise diversity jurisdiction, where the complaints sought declaratory judgments invalidating final state court divorce judgments which divided military retirement benefits as marital property, and where the federal issues involved had been raised in pending state divorce court proceedings?

(2) Was the district courts' refusal to exercise federal question jurisdiction proper in the cases below, where the federal questions alleged had vitality only as defenses to enforcement of the state court divorce judgments?

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OPINIONS BELOW

The opinions of the lower courts are correctly cited in the Petition.

JURISDICTION OF THIS COURT

Petitioners' basis for invoking jurisdiction, as set forth in the Petition, is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The questions presented by the Petition relate to the jurisdiction of federal district courts to decline to decide matters which are the subject of ongoing state court proceedings. Thus, the statutes primarily involved are those governing diversity jurisdiction, 28 U.S.C. § 1332(a) and federal question jurisdiction, 28 U.S.C. § 1331(a).

The cases below also involved jurisdiction under 28 U.S.C. § 1361 as

to the claims against the Secretaries of the Army and Air Force. The lower court held that the claims against those defendants were not ripe. The questions presented by the Petition do not include the ripeness issue.

STATEMENT OF THE CASE

The issues requiring consideration are relatively simple, straightforward questions concerning the scope of federal jurisdiction. The validity of final state court divorce judgments dividing military retirement benefits is not at issue, nor are the petitioners' claims against the Secretaries of the Army and Air Force.

In their "Statement of Facts" petitioners have enveloped these simple issues in a cloud of irrelevancies and misplaced argument. For the sake of clarity, the facts material to this case are presented below.

The case involves two separate actions for declaratory relief which were dismissed by the federal district courts for lack of jurisdiction and consolidated on appeal to the Ninth Circuit Court of Appeals. Each complaint had been filed by a retired military officer against his

former spouse and the Secretary of the military branch in which he had served. The Ninth Circuit affirmed the orders dismissing the complaints, and the retired officers have petitioned this Court for a Writ of Certiorari.

Petitioner ROBERT LOUIS STIRM is a former Air Force officer. He was married to respondent LORETTA ADAMS for eighteen years. In California State Court divorce proceedings, STIRM's military retirement benefits were found to be community property and were divided accordingly. The divorce Judgment became final in 1974, and STIRM took no appeal.

Similarly, petitioner ALBERT FERN, now a retired Army officer, was married to respondent JOAN TURMAN for twenty-four years. In a divorce Judgment which became final in 1978, the California Superior Court divided the community property interest in FERN's military retirement

benefits according to applicable California law. FERN did not appeal the Judgment.

Both STIRM and FERN stopped making payments of their retirement benefits to their former spouses at about the time this Court decided McCarty vs. McCarty 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed. 2d 589 (1981).

In February of 1982, respondent ADAMS filed a Motion in the California divorce Court to enforce her right to a portion of STIRM's retirement benefits under the 1974 Judgment.

Likewise, respondent TURMAN filed an enforcement Motion in the California divorce Court in April of 1982.

The enforcement proceedings are now pending on appeal in the California courts, petitioners having unsuccessfully attempted to remove them to the federal district courts.

Not satisfied with having raised their federal defenses in the state court

enforcement proceedings, STIRM and FERN, in separate actions, filed complaints for declaratory relief in the federal district courts. STIRM's action was filed in February of 1982, FERN's in September of that year.

STIRM's Complaint alleged federal question jurisdiction under 28 U.S.C. § 1331. FERN's Complaint alleged diversity jurisdiction under 28 U.S.C. § 1332(a). In addition to their former spouses, petitioners named as defendants the Secretaries of the Air Force and Army.[1/]

1/ FERN alleged diversity jurisdiction against the Secretary of the Army; STIRM invoked jurisdiction under 28 U.S.C. §§ 1331, 1332 and 1361 as against the Secretary of the Air Force. The Ninth Circuit held that the claims against the Secretaries were not ripe, and petitioners have not sought review of that holding by this Court.

In their complaints, petitioners STIRM and FERN asked for declaratory judgments that the final state court divorce decrees were invalid to the extent they divided petitioners' military retirment benefits. Alternatively, they sought declaratory judgments that they were no longer subject to recall to active duty (See footnote 1/).

Both complaints were dismissed, the federal district court in each case concluding that petitioners had failed to state a federal claim other than as a defense to the state court divorce decrees. As to diversity jurisdiction in the FERN case, the Court declined jurisdiction on the basis of the domestic relations exception to diversity jurisdiction.

Both STIRM and FERN appealed, and their cases were consolidated before the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the dismissals in both cases. Regarding federal question jurisdiction, the Court held that the federal claims were not claims arising under the laws of the United States, but rather defenses to state claims which should be raised in the pending state court actions, and not by way of declaratory relief actions in federal court.

As to the claims against the Secretaries of the Army and Air Force, the Ninth Circuit held that, inasmuch as they were contingent upon completion of the state court proceedings, as well as upon administrative action by the Secretaries, those claims were not yet ripe for adjudication.

With respect to diversity jurisdiction, the Ninth Circuit held that, under the circumstances present, the district court property exercised its discretion to decline jurisdiction based on the domestic relations exception to diversity

jurisdiction.

Additionally, the Court noted that the district courts have equitable discretion to decline requests for declaratory relief where, as here, state court proceedings involving substantially the same issues are pending. 2/

Petitioners seek review of the Ninth Circuit opinion, claiming that the decision was erroneous and conflicts with decisions in other circuits. Respondent disagrees, and hopes to show that the Ninth Circuit's decision was proper and consistent in the main with those of other circuits.

2/ Petitioners had briefed the merits of their cases to the Ninth Circuit in anticipation of a claim that passage of the Uniformed Services Former Spouses Protection Act (10 U.S.C. § 1408, henceforth "FSPA") rendered petitioners' claims moot. However, neither the merits of petitioners' claims, nor the question of mootness were addressed in the Ninth Circuit's opinion.

SUMMARY OF ARGUMENT

Respondent submits that the lower courts correctly concluded that there was no federal question jurisdiction over the underlying actions. A case does not arise under federal law when the federal question is merely an anticipated defense to a state claim. FSPA did not confer independent jurisdiction on the lower courts, nor was the domestic relations exception applied to federal question jurisdiction.

Diversity jurisdiction was properly declined by the lower courts on the basis of the domestic relations exception. The exception is to be applied in cases such as these, where there are state actions pending involving the same issues, and there is a risk of piecemeal and duplicative handling of the controversy.

The lower courts acted within the

scope of their equitable discretion in declining to entertain petitioners' claims for declaratory relief, especially in light of the pendency of the ongoing state proceedings.

The decisions of the lower courts do not present a conflict with those of other circuits. All circuits weigh the same policy considerations in applying the domestic relations exception, and those policy considerations favored application of the exception here.

It is unlikely that petitioners will ultimately prevail in their claims on the merits. But even if their claims are valid, their proper course is to pursue those claims first through the state courts, and then if necessary to seek review in this Court.

No grounds having been established for review by this Court, the Petition should be denied.

ARGUMENT

I. THE LOWER COURTS PROPERLY DISMISSED PETITIONERS' COMPLAINTS.

A. Petitioners Failed to Establish Federal Question Jurisdiction in the Lower Courts.

The Ninth Circuit held that there was no federal question jurisdiction where the federal issues raised by petitioners were viable only as defenses to enforcement of the state court claims and not as questions "arising under" federal law. 28 U.S.C. § 1331.

It is well settled that a case does not arise under federal law when the federal question is merely an anticipated defense to a state lawsuit. Rath Packing Co. vs. Becker, 530 F. 2d 295, 1304 (9th Cir. 1975) affd. 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604 (1977); Alton Box Board Co. vs. Esprit de Corp., 682 F.2d 1267, 1273-74 (9th Cir. 1982).

Less than one year ago, this Court denied review of a virtually identical

case in which the Ninth Circuit had affirmed dismissal of a complaint for declaratory relief brought by a former military officer seeking to invalidate a state court divorce judgment dividing his military retirement benefits and invoking federal question jurisdiction. Armstrong vs. Armstrong, 696 F.2d 1237 (9th Cir. 1983) cert den ____ U.S. _____, 104 S.Ct. 337, 78 L.Ed. 2d 306 (1983).

Petitioners also assert that 10 U.S.C. § 1408(c)(3) "independently supports federal jurisdiction" (Petition, page 52).

The statute referred to by petitioners is a provision of FSPA which proscribes the authority of a state court to order a military member to retire in order to effect a division of retired pay.

This statute does not, either expressly or impliedly, confer independent jurisdiction upon federal district courts. At most, the statute gives rise to a federal right which must be analyzed under

the applicable standard relating to federal question jurisdiction, along with petitioners' other federal claims.

In their desperate assault on the decisions below, petitioners also contend that the lower courts sought to extend the domestic relations exception to federal question jurisdiction (Petition, page 31). This contention lacks support in the record and can only be based on an erroneous reading of the opinions below.

Nowhere in their treatment of federal question jurisdiction did the lower courts in this case purport to apply the domestic relations exception. Instead, they uniformly analyzed the federal question issue according to the traditional standards discussed above. Thus, the decisions below cannot be said to be erroneous on that basis, nor do they present any conflict with other circuits in the federal question context.

B. The District Court Did Not Abuse Its Discretion in Declining Diversity Jurisdiction.

The FERN Complaint for declaratory relief invoked diversity jurisdiction under 28 U.S.C. 1332(a). The District Court applied the domestic relations exception to diversity jurisdiction and dismissed the Complaint. The Ninth Circuit affirmed, holding that the District Court properly exercised its discretion in applying the domestic relations exception.

Petitioners have offered no pursuasive reason for overturning the decisions of the lower court with respect to diversity jurisdiction.

The domestic relations exception to diversity jurisdiction is by now well established in all circuits. 13 C. Wright, A. Miller & E. Cooper, Federal Practice And Procedure, "Jurisdiction" Section 3609 (1975); Comment, "Federal Jurisdic-

tion and the Domestic Relations Exception: A Search for Parameters," 31 U.C.L.A. Law Rev. 843, 843-845 (1984), hereafter "Federal Jurisdiction."

Whether the domestic relations exception is viewed as depriving federal courts of jurisdiction or grounds for discretionary abstention,3/ sound policy reasons support its application in appropriate circumstances. As articulated

3/ Some courts view the exception as a matter left entirely to the discretion of the federal courts; others take the position that the grant of diversity jurisdiction did not include jurisdiction over domestic relations matters, and that abstention comes into play only when domestic relations issues are but tangentially involved. See Jagiella vs. Jagiella 647 F.2d 561, 564, note 11 (5th Cir. 1981); Csibi vs. Fustos 670 F.2d 134, 137 (9th Cir. 1982); Phillips, Nizer, Benjamin, Krim & Ballon vs. Rosentiel 490 F.2d 509, 516 (2d Cir. 1973). But the difference is academic; under either approach an examination of the underlying nature of the case and an application of the policy considerations supporting the exception will dictate the same result.

by the Fifth Circuit in Crouch vs. Crouch 566 F.2d 486, 487 (5th Cir. 1978), those policy reasons include:

> "The strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts."
>
> 566 F.2d at 487

Among the most significant factors to be considered in determining whether to apply the domestic relations exception is the pendency of state court proceedings involving the same issues or the "threat that the former spouses will seek to play one court system off against the other." Crouch, supra, 566 F.2d at 487. In such cases federal courts generally decline jurisdiction in order to avoid the possibility of "piecemeal, duplicative, or inexpert handling of what is substantially a single controversy." Lloyd vs. Loeffler 694 F.2d 489, 493 (7th Cir. 1982).

In the cases before this Court, there are ongoing state court proceedings involving substantially the same issues raised by petitioners' federal complaints.

Furthermore, if Petitioners are successful in their attacks on the state courts' division of the retirement benefits, this will work a modification of the divorce decrees and may well require adjustment of other aspects of the divorce decrees such as spousal support, child support, division of other property, or claims for reimbursement or attorneys' fees, all of which can best be determined by the state divorce courts, which retain jurisdiction under local law to make such post-judgment orders as may be just under the circumstances. California Civil Code Sections 4700, 4357, 4380 and 4811.

The lower courts in this case clearly recognized the existence of ongoing state court proceedings in which petitioners would have an opportunity to litigate their

federal claims. In light of the risk of piecemeal and duplicative handling of these controversies and the threat that this litigation could be used to play one court system off against the other, and with deference to considerations of comity, the lower courts properly applied the domestic relations exception and declined diversity jurisdiction.

C. Dismissal of the Claims For Declaratory Relief Was Within the Discretion of the District Courts.

The decision whether to entertain petitioners' complaints for declaratory relief was addressed to the sound discretion of the district courts. Public Affairs Press vs. Rickover, 369 U.S. 111, 82 S.Ct. 580, 7 L.Ed. 2d 604 (1962); Puerto Rico Int'l. Airlines, Inc. vs. Recio, 520 F.2d 1342, 1336 (1st Cir. 1975); 6 A. Moore's Federal Practice, paragraph 57.08 [3] at 57-43 (3 Ed. 1974).

The pendency of another action involving substantially the same issues

is a determinative factor in declining to exercise equitable jurisdiction, and thus avoiding duplicative and uncoordinated adjudications of the same disputes. Puerto Rico, supra, 369 U.S. 111, 82 S.Ct. 580, 7 L.Ed.2d 604 (1962); Geni-Chlor Int'l., Inc. vs. Multisonics Devel. Corp. 580 F.2d 981, 985 (9th Cir. 1978).

This is a form of judicial abstention distinct from the Pullman doctrine of abstention referred to by petitioners (Petition, pages 44-45). The Pullman doctrine dictates federal abstention from controversies which may be resolved on the basis of state law rather than federal law where sensitive areas of state social policy are involved. Railroad Commission of Texas vs. Pullman Co., 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

The issues raised by petitioners are clearly federal issues and cannot be resolved on the basis of state law. The

lower courts did not attempt to justify dismissal of petitioners' complaints on the basis of Pullman-type abstention.

However, the Pullman doctrine represents only one facet of federal judicial abstention.4/ Equitable restraint in declaratory relief actions is yet another form of abstention.

The type of abstention involved here stems from the traditional doctrine that a court of equity should refrain from action when an adequate remedy exists elsewhere, and is reinforced in the federal context by considerations of comity which militate against federal interference with state court proceedings. Huffman vs. Pursue Ltd. 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482, 490.

4/ For a discussion of abstention generally see Comment, "Federal Jurisdiction" 31 U.C.L.A. Law Rev. 843, 881, note 314.

Here, given that state court proceedings are pending in which petitioners have raised the same federal issues forming the bases of their requests for federal equitable relief, the district courts appropriately declined to exercise equitable jurisdiction, and rightly left petitioners to adjudicate their claims in the state court proceedings.[5/]

5/ Petitioners complain that the state courts are "hostile" to their claims, and that the result on appeal in the state court actions "appears to be pre-ordained." (Petition, pages 20 and 24). Petitioners are, in effect, urging this Court to accept review on the assumption that the state courts will not be faithful to their constitutional responsibilities. This Court has refused to make such an assumption in the past, and there is no reason to make that assumption now. See Huffman vs. Pursue, Ltd., supra, 420 U.S. 592, 611, 95 S.Ct. 1200, 43 L.Ed.2d 482, 496 (1975) and Dombrowski vs. Phister, 380 U.S. 479, 484-485, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

II. NO CONFLICT BETWEEN THE CIRCUITS IS PRESENTED BY THIS CASE.

Petitioners assert that the actions of the lower courts in dismissing the complaints conflict with decisions in other circuits. Specifically, petitioners contend that the lower courts applied the domestic relations exception in a manner which conflicts with the approach followed by other circuits. (Petition, pages 26 - 34).

According to petitioners the lower courts sought to "extend the marital exception to the federal question context" (Petition, page 31). This is simply not true.

The lower courts in this case did not employ the domestic relations exception in any form in dismissing the complaints for lack of federal question jurisdiction. Instead, the lower courts held that the federal issues raised by petitioners did not arise under federal law but had

vitality only as defenses to the state divorce decrees. Armstrong vs. Armstrong, supra, 696 F.2d 1237 (9th Cir. 1983) cert den _____ U.S. ____, 104 S.Ct. 337, 78 L.Ed.2d 306 (1983); See also discussion, supra, pages 10-12 of this brief.

In this approach to federal question jurisdiction, the decisions of the lower courts did not conflict with those of other circuits, and require no review in this Court.

Likewise, the decisions of the lower courts regarding diversity jurisdiction do not present a conflict with other circuits, notwithstanding the application of the domestic relations exception.

The history of the domestic relations exception does not require re-examination here. It is enough to note that the exception has its roots in the opinions of this Court, and is by now a well established principle of diversity

jurisdiction.[6]

Petitioners claim that "hopeless confusion" exists among the circuits in their application of the domestic relations exception. A careful reading of the opinions of the various circuit courts reveal, at most, a difference in approach. This difference can lead to differing results when the cases under consideration go far beyond the traditional concerns of state domestic relations courts, as in tort actions between family members or civil rights actions against governmental agencies or employees for interference with family relationships. See Comment, "Federal Jurisdiction" 31 U.C.L.A. Law Rev. 843, pages 859, 870-871.

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[6] See Barber vs. Barber, 62 U.S. (21 How.) 582, 584 (1858); In re Burrus, 136 U.S. 586 (1890); Ohio ex rel Popovici re Agler, 280 U.S. 379 (1930). For further discussion of the evolution of the domestic relations exception, see Comment, "Federal Jurisdiction" 31 U.C.L.A. Law Rev. 843, pages 847-851.

Even if such a conflict can be said to exist on the outer fringes of the domestic relations exception, that conflict certainly is not presented by this case.

It is universally acknowledged that strong policy reasons support the application of the domestic relations exception in appropriate cases:

> "The exercise of federal jurisdiction in domestic actions such as those for divorce, alimony, or custody would create the possibility of piecemeal, duplicative, or inexpert handling of what are generally single controversies in a very sensitive area. This would not be in the best interests of a troubled family. Futhermore, the exercise of federal jurisdiction in this area could also result in incompatible federal and state decrees in cases subject to the continuing jurisdiction of the state. These reasons, as well as the strong state interest in domestic relations matters within its borders and the superior competence of the state courts in adjudicating and monitoring family disputes, warrant the continued application of the domestic relations exception to diversity cases by the federal courts."
>
> Comment, "Federal Jurisdition, 31 U.C.L.A. Law Rev. 843, at 852-853, and cases referred to therein.

The cases below illustrate graphically the very concerns which have been expressed repeatedly by the courts considering the application of the domestic relations exception. The state court enforcement actions here predated the filing of the federal complaints, and petitioners' claims are in reality only defenses to the state court divorce decrees which divided their military retirement benefits, and which are now the subjects of the enforcement actions. For a federal court to intervene in such a case it is virtually to guarantee the duplicative, piecemeal and potentially incompatible results which the domestic relations exception was designed to avoid.

Petitioners claim that the Fifth Circuit position, in particular, cannot be reconciled with the lower court actions here. In support of their contention, petitioners point in particular to Erspan vs. Badgett, 647 F.2d 550

(5th Cir. 1981), which petitioners say "directly conflicts" with the decision below.

Erspan was an action to enforce a state court judgment ordering payment of specified amounts. In contrast, petitioners' federal complaints here seek to partially invalidate (and thus effectively modify) the state court divorce judgments.

Additionally, Erspan did not involve pending state court proceeedings, to which the Court might well, on policy grounds, have deferred. Again, this is in contrast to the situation here, where state litigation involving the identical issues is being actively pursued.

In Erspan, the Court reviewed the traditional policy considerations underlying the domestic relations exception, including the existence of "pending state court action," the "possibility of incompatible federal and state court decrees in cases of continuing judicial supervi-

sion by the state," and the "threat that the former spouses will seek to play one court system off against the other." The Court correctly concluded in Erspan that the case involved "none of the concerns upon which the domestic relations exception rests," and therefore approved the district court's assertion of diversity jurisdiction. Erspan, supra, 647 F.2d at 553, note 1.

The Ninth Circuit in its Opinion below considered Erspan and appropriately distinguished it on its facts, after examining the same policy considerations weighed by the Erspan court.

Since no real conflict exists between the circuits as to the correct application of the domestic relations exception in the circumstances presented, there is no need for review by this Court, and the decisions below should stand.

III. PETITIONERS' PROPER COURSE IS TO LITIGATE THEIR FEDERAL DEFENSES IN THE STATE COURT ENFORCEMENT PROCEEDINGS.

A substantial portion of the Petition is devoted to the merits of petitioners' underlying complaints (Petition, pages 12-25), even though the issues on the merits are well beyond the scope of the Petition itself. Petitioners' main arguments on the merits are two-fold:

1. Petitioners claim that this Court's decision in McCarty v. McCarty, supra, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) rendered the final state court divorce decrees void ab initio to the extent they divided petitioners' military retirement benefits. Petitioners take the position that decisions based on federal pre-emption, such as McCarty, require retroactive application to final state court judgments, notwithstanding principles of res judicata.

2. Petitioners also attack the constitutional validity of FSPA (10 U.S.C. § 1408), the federal legislation which clarified Congress' intent to permit state divorce courts to divide military retirement benefits. Petitioners contend that FSPA violates the Fifth Amendment

by divesting petitioners of a portion of their retirement pay.[7/]

Neither of petitioners' claims on the merits is likely to be successful, either in federal court or in state court.

With respect to petitioners' first claim, the vast majority of jurisdictions considering the retroactivity of the McCarty decision have decided against retroactive application.

7/ Ironically, even as this challenge to FSPA is made, petitioner FERN relies on FSPA in attacking the divorce court's prior order that he pay to his former wife a portion of his retirement pay at the time when he was eligible for retirement, claiming that this in effect required him to retire contrary to Section 1408(c)(3) of the Act. FERN did not, in fact, retire when the Judgment was rendered, nor did he appeal or otherwise take exception to the divorce court's order in that respect, and it is difficult to understand how he can justify a constitutional attack on the Act while at the same time invoking its protection against a portion of the divorce decree long since acquiesced in.

Among the cases which have so held are: In re Marriage of Mahone, 123 Cal.App.3d 17, 176 Cal.Rptr. 274 (1981); In re Marriage of Sheldon, 124 Cal.App.3d 371, 177 Cal.Rptr. 380 (1981), appeal dismissed for want of a substantial federal question 456 U.S. 941, 102 S.Ct. 2002, 72 L.Ed.2d 462 (1982); In re Marriage of Fellers, 125 Cal.App.3d 254, 178 Cal.Rptr. 35 (1981); In re Marriage of McGhee, 131 Cal.App.3d 408, 182 Cal.Rptr. 456 (1982); Erspan vs. Badgett, supra, 647 F.2d 550 (5th Cir. 1981), reh. den. en banc with opinion, 659 F.2d 26 (1981), cert. den. 102 S.Ct. 1433; Wilson vs. Wilson 667 F.2d 497 (5th Cir. 1982); Duke vs. Duke 643 P 2d 1205 (Nev. 1982); Vinson and Vinson, 644 P 2d 635, (Or.App.1981); Duren vs. Duren, 627 SW 2d 585 (Ky.1982); Ex parte Rodriguez, 628 SW 2d 500 (Tex.App.1981); Ex parte Gaudion, 628 SW 2d 500 (Tex.App.1982);

Ex Parte Welch, 633 SW 2d 691 (Tex.App. 1982); Ex Parte Hovermale 636 SW 2d 828 (Tex.App.1982).

The leading California decision in this area is In re Marriage of Sheldon, supra, 124 Cal.App.3d 371 (1981) dism. 456 US 941. The Sheldon court analyzed the retroactivity question in terms of the test formulated by this Court in Chevron Oil Co. vs. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

Petitioners assert that the Chevron Oil holding does not set forth the correct test for determining retroactivity of the McCarty decision. In place of the Chevron Oil test, petitioners cite Firestone Tire & Rubber Co. vs. Risjord, 449 U.S. 368, 379, 101 S.Ct. 669, 66 L.Ed.2d. 571 (1981) and Holzsager vs. Valley Hospital, 446 F.2d 792, 798 (2d Cir. 1981), (concurring opinion). Neither of these cases is applicable to the retroactivity question presented by

McCarty.

Risjord did not involve questions of federal pre-emption, nor any question of retroactivity beyond the very case under consideration there. Risjord simply stands for the proposition that where a lower court properly finds that it lacks jurisdiction to decide a case, it may not proceed to decide the merits of that claim simply because its decision on the jurisdictional issue represents a departure from precedent.

Holzsager approved retroactive application of a decision limiting quasi in rem attachment jurisdiction. However, the case did not involve a prior judgment or principles of res judicata. Moreover, the lead opinion in that case expressly followed Chevron Oil in determining the retroactivity question.

Chevron Oil, supra, requires consideration of the following three

factors: 1) whether the decision in question establishes new law by overruling clear past precedent, 2) whether the history, purpose and effect of the new decision mandates retroactive application, and 3) whether retroactive application of the decision would produce substantial inequity or hardship.

The McCarty decision certainly had the effect of overruling past precedent and the decision contains no indication that this Court intended it to apply retroactively. The inequity and hardship which would result from retroactive application is likewise obvious. Countless judgments which were fair and equitable at the time they were rendered would be hopelessly impaired by retroactive application, a multitude of suits to cover amounts already paid under those judgments would doubtless follow as well as virtually endless litigation in an effort to restore the balance thus

disturbed. In short, one can hardly imagine a less appropriate or equitable case for retroactivity.

The ultimate success of petitioners' constitutional challenge to FSPA seems even less assured. Petitioners rely on three cases to support their Fifth Amendment challege to FSPA: United States vs. Larionoff, 431 U.S. 864, 879, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); Costello vs. United States, 587 F.2d 424, 427 (9th Cir. 1978), cert. den. 442 U.S. 929 (1979); and United States vs. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982).

However, none of the cases cited by petitioners can be said to support their constitutional claims with respect to FSPA. Those cases merely reiterate the notion that, in order to survive a Fifth Amendment challenge, retrospective legislation must be clearly intended to be retroactive, and must

serve a legitimate purpose furthered by rational means. See also Pension Benefit Guaranty Corp. vs. R.A. Gray & Co., ____ U.S. _____, ____ S.Ct. _____, 81 L.Ed.2d 601 (1984).

The legislative history of FSPA discloses a comprehensive and rational approach to the conflicting interests to be considered in resolving the problems which arose following the McCarty decision, problems which were clearly recognized by this Court in rendering the decision in McCarty:

> "We recognize that the plight of an ex-spouse of a retired service-member is often a serious one . . . Congress may well decide, as it has in the civil service and foreign service context, that more protection should be afforded a former spouse of a retired servicemember. This decision, however, is for Congress alone. We very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs."
>
> 453 US at pp. 235-236.

Congress responded to the invitation

of this Court in a careful and studied manner, and the resulting legislation must surely survive petitioners' Fifth Amendment challenge.

Furthermore, even if petitioners are assured of ultimate success on the merits of their claims, they have an appropriate forum in the ongoing state court enforcement actions, in which to raise their federal concerns. In addition, they will have the opportunity, ultimately, to seek review by this Court of any adverse decision.

State courts are bound by the federal Constitution and federal laws just as federal courts. This Court should not accept review of the cases below simply because petitioners are afraid that the state judges will not be faithful to their constitutional responsibilities. See Huffman vs. Pursue Ltd., supra, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

Petitioners are both California residents with an opportunity to assert their federal defenses in the pending state divorce actions.

Therefore, the lower courts correctly concluded that petitioners' federal complaints should be dismissed and that petitioners should pursue their federal claims in the state courts.

IV. CONCLUSION

Petitioners have failed to state any grounds for this Court's review of the decisions below. No error on the part of the lower courts has been shown, nor is any significant conflict with other jurisdictions presented.

Respondent submits that the decisions of the lower court should stand, and requests that this Court deny the Petition for a Writ of Certiorari.

Dated: December 17, 1984

Respectfully submitted,

STONER, WELSH & SCHMIDT

By: _____
KATHERINE E. STONER,
Attorneys for Respondent
JOAN TURMAN

CERTIFICATE OF SERVICE

I, KATHERINE E. STONER, attorney for respondent JOAN TURMAN, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of December, 1984, I served copies of the foregoing Respondent's Brief in Opposition to Petition for A Writ of Certiorari on the several parties thereto, as follows:

1. On John O. Marsh, Secretary of the Army and Verne Orr, Secretary of the Air Force by depositing a copy of the document in a United States mailbox, with first class postage prepaid, addressed to G. Christopher Stoll, Esq., Assistant to the United States Attorney, 450 Golden Gate Avenue, 16th Floor, San Francisco, California 94102 and by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to Solicitor General, Department of

Justice, Washington D.C. 20530.

2. On Albert John Fern, Jr. and Robert Louis Stirm, by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to their counsel of record, Mattaniah Eytan, Esq., KAPLAN, RUSSIN, VECCHI, EYTAN & COLLINS, 332 Pine Street, 4th Floor, San Francisco, California 94104.

3. On Loretta F. Adams by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to her counsel of record, Michael A. Atherton, Esq., ATHERTON & DUNN, 289 So. San Antonio Road, Suite 200, Los Altos, California 94022, and by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to Robert K. Booth, Jr., WILSON, MORTON, ASSAF & McELLIGGOTT, 630 North San Mateo Drive,

San Mateo, California 94401.

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